

NO. 47657-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SARAH JOHNSON, as Personal Representative of the ESTATE OF
PHILLIP CUNNINGHAM,

Appellant,

v.

CITY OF TACOMA, a municipality,

Respondent/Cross-appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. The plaintiff's objection to the cross-appeal is not timely.

Plaintiff argues that this court should strike the City's cross-appeal because the cross-notice was filed on June 29, 2015, which was 30 days after the plaintiff's notice of appeal whereas the rule requires that the notice be filed 14 days after the notice of review. However, plaintiff's objection comes too late.

In State v. Glenn, 115 Wn. App. 540, 62 P.3d 921 (2003), review denied, 149 Wn.2d 1007 (2003) the plaintiff also failed to bring notice of cross-appeal within the 14 days of the defendant's appeal. Defendant argued that the notice of cross-appeal was untimely. The appellate court held that defendant should have objected at the time that the appellate court accepted review. Having accepted review, and not having a timely objection from the defendant, the issues in the cross-appeal were properly before the appellate court. As in Glenn, this court should decide that the issues in the cross-appeal are properly before the court.

II. The City's issues are properly considered under RAP 2.4

Even if this court does not review the issues designated in the City's cross-appeal for purposes of granting or denying affirmative relief to the City on those issues under RAP 5.2, the issues are properly before the court pursuant to RAP 2.4. Under RAP 2.4(a), this court "will, at the instance of the respondent, review those acts in the proceeding below

which if repeated on remand would constitute error prejudicial to respondent.” The appellate court will review such trial court rulings without the necessity of a notice of review. State v. Roberts, 88 Wn.2d 334, 562 P.2d 1259 (1977); Karl B. Tegland, 2A WASHINGTON PRACTICE, RULES PRACTICE, p. 189 (8th ed. 2014). In this case, if the appellate court reverses summary judgment and remands the case for trial, the City will be prejudiced by the trial court’s ruling on the Deadman’s Statute. Therefore, the issues concerning the trial court’s ruling on the Deadman’s Statute and the Order Striking the Testimony of Marni Moore are properly before this court under RAP 2.4(a).

III. The Deadman’s Statute is not applicable.

Plaintiff does not dispute that Marni Moore’s retirement benefits will not and cannot be affected by whether or not the TERS fund retains Mr. Cunningham’s contributions. Plaintiff does not dispute that Ms. Moore has no direct, immediate, and certain interest in the outcome of the litigation. Appellant’s Reply Brief, p. 4. Plaintiff’s only argument is that all City employees have an interest in “preservation of plan assets.” But as the trial court aptly pointed out, this argument necessarily presumes that City employees knew at the time that Mr. Cunningham made his retirement election that he would take his own life before the TERS fund paid him significant retirement benefits. VRP 18:19 -24. That argument is

contrary to common sense and without any factual support at all.

Plaintiff does not dispute that City employees' retirement benefits are guaranteed by the Tacoma Municipal Code and by state law, and are not dependent on the health of the fund. Ms. Moore's retirement benefits will not be altered in any way by the retention of Mr. Cunningham's contributions or any other retiree's contributions. Thus, neither Ms. Moore nor any other City employee has the direct, immediate and certain benefit that is required to be considered an "interested party" for purposes of the Deadman's Statute under the facts of this case.

IV. Plaintiff's cases do not support her argument.

Plaintiff has not cited to cases that support her argument.

Plaintiff cites to May v. Triple C Convalescent Ctrs., 19 Wn. App. 794, 578 P.2d 541 (1978) but in that case the appellate court held that the trial court had abused its discretion in excluding testimony under the Deadman's Statute. Similarly, In re Estate of Cordero, 127 Wn. App. 783, 113 P.3d 16 (2005) and Ebel v. Fairwood Park Homeowners' Ass'n, 136 Wn. App. 787, 150 P.3d 1163 (2007), the courts held that the Deadman Statute did not apply because the persons purported to be interested parties did not stand "to gain or lose by the operation and effect of the action or judgment in question." 136 Wn. App. at 791-92.

V. The Deadman's Statute has been waived.

Plaintiff contends that "the issue in this case is the representations by the City to Mr. Cunningham and Mr. Cunningham's alleged understanding." Appellant's Reply Brief, p. 4-5. Plaintiff does not suggest how she intends to provide evidence of the City's representations without calling City witnesses. By putting the representations of City witnesses at issue in this case, the plaintiff has waived the Deadman's Statute. Erickson v. Kerr, 125 Wn.2d 183, 187-88, 883 P.2d 313 (1994).

Moreover, the City asserted the argument of waiver in its opening brief and the plaintiff has not provided any response. This court should hold that to the extent the Deadman's Statute applies, it has been waived.

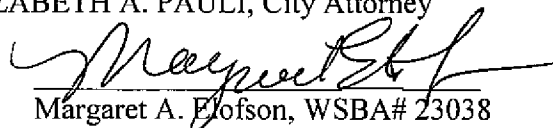
VI. CONCLUSION

To the extent that this court reverses the trial's summary judgment dismissal, the City respectfully requests that this court also reverse the trial court's ruling concerning the Deadman's Statute.

Dated this 19th day of January, 2016.

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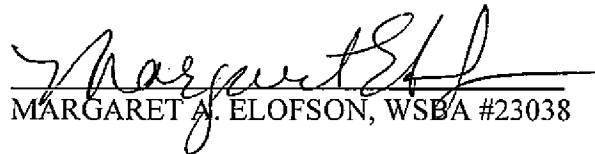
CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2016, I filed,
through my staff, the foregoing with the Clerk of the court for the Court of
Appeals, Division II, for the State of Washington via electronic filing.

A copy of the same is being emailed and mailed, via U.S. mail,
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TACOMA CITY ATTORNEY

January 19, 2016 - 1:56 PM

Transmittal Letter

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Court of Appeals Case Number: 47657-6

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Reply Brief of Respondent/Cross-Appellant

Sender Name: Margaret A Elofson - Email: margaret.elfson@ci.tacoma.wa.us